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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

KFX MEDICAL CORPORATION, a  
Delaware corporation,

Plaintiff and Counterdefendant,

v.

ARTHREX, INCORPORATED, a  
Delaware corporation,

Defendant and Counterclaimant.

Case No. 11cv1698 DMS (BLM)

**KFX'S TRIAL BRIEF  
PURSUANT TO LOCAL RULE  
16.1(f)(9)(a)**

Trial Date: August 19, 2013

Time: 9:00 A.M.

Courtroom 13A

Honorable Dana M. Sabraw

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1 Pursuant to Local Rule 16.1(f)(9)(a) and paragraph 7 of the Court's  
2 July 19, 2013, Order Regarding Trial [D.I. 138], Plaintiff KFx Medical  
3 Corporation ("KFx") submits this trial brief.

## 4 **I. INTRODUCTION**

5 KFx owns U.S. Patent Nos. 7,585,311 ("the '311 patent"), 8,100,942  
6 ("the '942 patent"), and 8,109,969 ("the '969 patent") (collectively, "the KFx  
7 patents"). The KFx patents concern a method of attaching soft tissue, such as a  
8 tendon, to bone. The patented methods can be used in a number of applications,  
9 but primarily have been used for arthroscopically repairing a torn rotator cuff.

10 In this trial, KFx will demonstrate that Defendant Arthrex, Inc.  
11 ("Arthrex") has willfully infringed claims 1, 20 and 28 of the '311 patent,  
12 claims 1 and 18 of the '942 patent, and claims 1 and 3 of the '969 patent by  
13 making, selling, offering for sale, and promoting the accused SutureBridge and  
14 SpeedBridge surgical procedures. KFx will also establish that it is entitled to a  
15 reasonable royalty on Arthrex's sales of the products used in the infringing  
16 procedures and a permanent injunction to prevent further infringement. Because  
17 Arthrex's infringement was and continues to be willful, the Court should award  
18 KFx up to three times the damages awarded at trial, as well as KFx's reasonable  
19 attorneys' fees.

## 20 **II. DISPUTED ISSUES**

### 21 **A. Arthrex Has Willfully Infringed the KFx Patents**

22 Arthrex sells products that are marketed for use in its SutureBridge  
23 double-row rotator cuff repair technique and its SpeedBridge knotless double-  
24 row footprint reconstruction surgical technique. Performance of either  
25 Arthrex's SutureBridge or SpeedBridge procedure directly infringes the asserted  
26 claims of the KFx patents. Arthrex willfully infringes the asserted claims of the  
27 KFx patents by actively inducing surgeons to perform the SutureBridge and  
28 SpeedBridge procedures, thereby infringing the KFx patents.

1           **1. Performance of the SutureBridge and SpeedBridge Technique**  
 2           **Directly Infringes the Asserted Claims of the KFx Patents**

3           To prove infringement, a patentee must establish by a preponderance of  
 4           the evidence that every limitation of the patent claim be found in the accused  
 5           method. *See Wenger Mfg., Inc. v. Coating Mach. Sys., Inc.*, 239 F.3d 1225  
 6           (Fed. Cir. 2001).

7           At trial, KFx will demonstrate by a preponderance of the evidence that  
 8           the accused SutureBridge and SpeedBridge procedures directly infringe claims  
 9           1, 20 and 28 of the '311 patent, claims 1 and 18 of the '942 patent, and claims 1  
 10          and 3 of the '969 patent. Performance of the SutureBridge and SpeedBridge  
 11          procedures meets every limitation of the asserted claims of the KFx patents.

12                   **a. The '311 Patent**

13          Performance of the SutureBridge and SpeedBridge procedures directly  
 14          infringes claims 1, 20 and 28 of the '311 patent. KFx will present evidence that  
 15          each limitation of claim 1 is performed when Arthrex's customers practice the  
 16          SutureBridge and SpeedBridge procedures as taught by Arthrex. These  
 17          procedures involve first inserting a first anchor into bone such that it is  
 18          positioned underneath the soft tissue and that no part of the anchor extends  
 19          beyond an edge of the soft tissue. Second, a length of suture is passed over the  
 20          tendon, and third, a second anchor (a PushLock or SwiveLock anchor) is  
 21          inserted into bone so that it is positioned beyond the edge of the soft tissue and  
 22          is not underneath the soft tissue. Fourth, the length of suture is tensioned to  
 23          compress an area of tissue to bone between the edge of soft tissue and the first  
 24          anchor after the second anchor is inserted. Finally the suture is fixedly secured  
 25          to the second anchor without tying any knots.

26          Claim 20 incorporates the method of claim 1, but includes two additional  
 27          anchors (*i.e.*, four total suture anchors—two medial and two lateral) and adds an  
 28          additional requirement that the suture passing from the second medial anchor to

1 the second lateral anchor crosses over the suture passing from the first medial  
2 anchor to the first lateral anchor. Claim 28 also incorporates the method of  
3 claim 1, and further requires that the inserting, passing, and fixedly securing  
4 steps be conducted arthroscopically. KFx will present evidence to show that the  
5 accused procedures perform the additional steps recited in these dependent  
6 claims.

7 **b. The '942 Patent**

8 Performance of the SutureBridge and SpeedBridge procedures directly  
9 infringes claims 1 and 18 of the '942 patent. KFx will present evidence that  
10 each limitation of claim 1 is performed when Arthrex's customers practice the  
11 SutureBridge and SpeedBridge procedures as taught by Arthrex. First, a first  
12 anchor is inserted into bone such that it is positioned underneath the soft tissue,  
13 and second, suture is passed through and over the rotator cuff tissue. Third, a  
14 second anchor that has a distal member and a proximal member is inserted into  
15 bone at a position beyond an edge of the soft tissue. The second (lateral) anchor  
16 in the SutureBridge and SpeedBridge procedures includes a distal member and a  
17 proximal member because the PushLock and SwiveLock anchors are two-piece  
18 anchors with an eyelet portion (the distal member) and a body portion (the  
19 proximal member). Fourth, after inserting the distal member of the second  
20 anchor, the length of suture from the first anchor is tensioned to compress an  
21 area of tissue to bone between the edge of the soft tissue and the first anchor.  
22 Finally, the techniques each include the step of fixedly securing the length of  
23 suture at the second anchor position, without tying any knots, by moving the  
24 proximal member distally toward the distal member. In the infringing  
25 techniques, this is done when the anchor body (proximal member) is screwed or  
26 tapped into the bone until it is adjacent to the eyelet portion (distal member).

27 Claim 18 recites the method of claim 1, but includes a second medial  
28 anchor, which is referred to as the third anchor in the claim. KFx will present



1 evidence to show that the accused procedures include the additional  
2 requirements recited in this claim.

3 **c. The '969 Patent**

4 Performance of the SutureBridge and SpeedBridge procedures directly  
5 infringes claims 1 and 3 of the '969 patent. KFx will present evidence that each  
6 limitation of claim 1 is performed when Arthrex's customers practice the  
7 SutureBridge and SpeedBridge procedures as taught by Arthrex. First, a first  
8 anchor is inserted into bone such that it is positioned underneath the soft tissue,  
9 and second, suture is passed through and over the rotator cuff tissue. Third, a  
10 portion of a second anchor (the distal or eyelet portion of the Pushlock or  
11 SwiveLock two-piece anchor) is inserted into bone so that it is positioned  
12 beyond the edge of the soft tissue. Fourth, the length of suture is tensioned to  
13 compress an area of tissue to bone between the edge of soft tissue and the first  
14 anchor after the portion of the second anchor is inserted. Fifth, the techniques  
15 each include the step of fixedly securing the length of suture at the second  
16 anchor position without tying any knots. Finally, PushLock and SwiveLock  
17 anchors each include an anchor tip (the distal eyelet portion of the anchor) and a  
18 hollow cylinder (the proximal body portion of the anchor), and the distal eyelet  
19 portion includes an aperture through which suture material is threaded prior to  
20 insertion of the anchor.<sup>1</sup>

21 Claim 3 recited the method of claim 1, but further requires that the anchor  
22 tip comprises an anchor inserter attachment member. KFx will present evidence  
23 to show that the accused procedures include the additional requirement recited  
24 in this claim.

---

25  
26 <sup>1</sup> KFx also asserted a doctrine of equivalents argument as to the "hollow cylinder"  
27 limitation. To simplify the case, however, the parties reached the following agreement. KFx  
28 will not present the doctrine of equivalents argument and Arthrex will not contest that the  
"hollow cylinder" limitation is met by the accused procedures. In other words, Arthrex will  
not challenge that it is met but KFx will not tell the jury that Arthrex has conceded it.

1           **2.     Arthrex Actively Induced Infringement of the KFx Patents**

2           Under 35 U.S.C. § 271(b), “[w]hoever actively induces infringement of a  
3     patent shall be liable as an infringer.” To establish induced infringement, the  
4     patentee must show by a preponderance of the evidence that the defendant acted  
5     with specific intent to induce infringement of the patent. *See DSU Med. Corp.*  
6     *v. JMS Co., Ltd.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (*en banc*). This requires  
7     the patentee to prove that the defendant knew of the patent or was willfully  
8     blind to its existence, and knew or was willfully blind to the fact that the acts it  
9     induced, if taken, would constitute infringement of the patent. *See Commil*  
10    *USA, LLC v. Cisco Sys., Inc.*, No. 2012-1042, 2013 WL 3185535, at \*3-\*4 (Fed.  
11    Cir. June 25, 2013). The patentee must also demonstrate that someone directly  
12    infringed at least one patent claim. *See Lucent Techs., Inc. v. Gateway, Inc.*,  
13    580 F.3d 1301, 1322 (Fed. Cir. 2009).

14           KFx will demonstrate by a preponderance of the evidence that Arthrex’s  
15    SutureBridge and SpeedBridge procedures directly infringe the asserted claims  
16    of the KFx patents. KFx will also show that Arthrex knew of the KFx patents  
17    and acted with specific intent to induce infringement of the KFx patents. For  
18    example, at least as early as September 2006, John Schmieding, Arthrex’s in-  
19    house counsel, was aware of the KFx patent application that issued as the ’311  
20    patent. Arthrex emails from August 2009 prove that Arthrex knew of the ’311  
21    patent claims one month before the patent issued, and additional emails from  
22    September 2009 prove that Arthrex knew that the patent had issued. Despite  
23    this knowledge, Arthrex has provided multiple teaching guides, animations, and  
24    surgical videos on its website that demonstrate for surgeons how to perform the  
25    SutureBridge and SpeedBridge procedures, procedures which include the steps  
26    in the asserted claims of the KFx patents. Moreover, in addition to selling  
27    individual components for use in the infringing procedures, Arthrex has also  
28    sold kits especially adapted for those procedures. Arthrex has also extensively

1 trained its sales representatives to teach surgeons how to perform the  
2 SutureBridge and SpeedBridge procedures and has extensively advertised these  
3 procedures. Through this and other evidence, KFx will demonstrate that  
4 Arthrex knew or was willfully blind to the knowledge that performance of the  
5 SutureBridge and SpeedBridge procedures would infringe the '311 patent.

6 Similarly, when the '942 and '969 patents issued, Arthrex knew or was  
7 willfully blind to the fact that the accused SutureBridge and SpeedBridge  
8 procedures also infringed these patents because Arthrex was already aware of its  
9 infringement of the '311 patent by virtue of this lawsuit.

### 10 **3. Arthrex's Infringement Is Willful**

11 To establish willful infringement, a patentee must show by clear and  
12 convincing evidence that the defendant, with knowledge of the patent, acted  
13 despite an objectively high likelihood that its actions constituted infringement.  
14 *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (*en banc*).  
15 The patentee must also demonstrate that the objectively high risk was either  
16 known or so obvious that it should have been known to the defendant. *Id.*

17 KFx will show by clear and convincing evidence that Arthrex knew of the  
18 KFx patents and acted despite an objectively high likelihood that its actions  
19 constituted infringement. KFx will also demonstrate that the objectively high  
20 risk was known or so obvious it should have been known to Arthrex.  
21 Notwithstanding Arthrex's knowledge of the risk that the accused procedures  
22 infringe the KFx patents, Arthrex has done nothing to change its business  
23 practices. Rather, Arthrex continues to violate KFx's intellectual property  
24 rights.

25 Although Arthrex obtained legal opinion letters regarding the KFx  
26 patents, those opinions were not sought until years after KFx's '311 patent  
27 issued and well after KFx filed this lawsuit. KFx will show that these opinion  
28 letters were untimely and cannot negate Arthrex's knowledge of the objective

1 high risk of infringement. Moreover, the opinions were so fundamentally  
2 flawed that they could not have provided a reasonable basis for Arthrex to  
3 conclude that the SutureBridge and SpeedBridge procedures did not infringe the  
4 KFx patents or that the patents were invalid.

5 **B. The KFx Patents Are Valid**

6 Patents are presumed to be valid. 35 U.S.C. § 282. To overcome this  
7 presumption, the party challenging the validity of a patent must prove facts  
8 supporting a determination of invalidity by clear and convincing evidence. *See*  
9 *Schumer v. Lab. Computer Sys., Inc.*, 308 F.3d 1304, 1315 (Fed. Cir. 2002). At  
10 trial, Arthrex will not be able to meet its burden of demonstrating invalidity by  
11 clear and convincing evidence.

12 **1. The Asserted Claims of the KFx Patents Are Not Anticipated**

13 To establish that a patent is invalid based upon anticipation, the party  
14 challenging the validity of the patent must prove by clear and convincing  
15 evidence that the claimed inventions are not new. *See* 35 U.S.C. § 282;  
16 *TypeRight Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1157 (Fed. Cir.  
17 2004). For a claim to be invalid because it is not new, each and every element  
18 in the claim must be present *in a single item of prior art*, and arranged or  
19 combined in the same way as recited in the claim. *See Net MoneyIN, Inc. v.*  
20 *VeriSign, Inc.*, 545 F.3d 1359, 1369 (Fed. Cir. 2008) (emphasis added).

21 Arthrex cannot meet its burden of proving by clear and convincing  
22 evidence that a single item of prior art, *i.e.*, a single prior art procedure or prior  
23 art disclosure of a procedure, discloses all elements of the asserted method  
24 claims of the KFx patents. Arthrex contends that a collection of items it labels  
25 the “ElAttrache/Arthrex work” anticipates the asserted claims of the KFx  
26 patents. Yet Arthrex has not—and cannot—identify *a single item of prior art*  
27 from within this collection that discloses each and every limitation of the  
28 asserted claims with the limitations arranged in the same way as recited in the

1 asserted claims. For example, this work did not include, *inter alia*, the step of  
2 tensioning suture after inserting the Bio-Tenodesis screw, or any portion  
3 thereof, into bone and also included tying knots over the screw to secure the  
4 suture thereto. Moreover, because the Bio-Tenodesis is a single-piece anchor, it  
5 cannot meet any of the limitations requiring a two-piece anchor. And much of  
6 Arthrex's evidence of the "ElAttrache/Arthrex work" does not constitute prior  
7 art or evidence of an item of prior art under any subsection of 35 U.S.C. § 102.

8 **2. The Asserted Claims of the KFx Patents Are Not Obvious**

9 To establish that a patent is invalid as obvious in view of the prior art, the  
10 party challenging the validity of the patent must show by clear and convincing  
11 evidence that the claimed invention would have been obvious to persons of  
12 ordinary skill in the art at the time the invention was made. *See* 35 U.S.C. §  
13 103; *Sciele Pharma Inc. v. Lupin Ltd.*, 684 F.3d 1253, 1260 (Fed. Cir. 2012).  
14 Obviousness is a question of law based on underlying factual findings including  
15 the scope and content of the prior art, the differences between the claims and the  
16 prior art, the level of ordinary skill in the art at the time the invention was made,  
17 and "secondary considerations" or "objective evidence" of nonobviousness. *See*  
18 *Osram Sylvania, Inc. v. Am. Induction Techs., Inc.*, 701 F.3d 698, 706 (Fed. Cir.  
19 2012). Objective evidence of nonobviousness includes evidence of copying,  
20 commercial success, praise by others, failure of others, and long-felt need. *See*  
21 *Mintz v. Dietz & Watson, Inc.*, 679 F.3d 1372, 1379 (Fed. Cir. 2012).

22 Arthrex will not be able to prove by clear and convincing evidence that  
23 the invention claimed by the KFx patents would have been obvious to a person  
24 of ordinary skill in the art at the time the invention was made. For example,  
25 Arthrex's alleged prior art does not teach or otherwise suggest the invention  
26 recited in the claims of the KFx patents, and there is no reason to combine the  
27 various prior art references in the manner Arthrex alleges. The only reasons  
28 provided by Arthrex's technical expert, Dr. Jonathan Greenleaf, for combining

1 the prior art references as suggested by Arthrex are (1) that the prior art  
2 references are in the same technical field, (2) that they all relate to attaching soft  
3 tissue to bone, and (3) that they are pertinent to problems addressed in or the  
4 devices disclosed in the specification of the KFx patents. This is insufficient to  
5 establish a reason for combining the references in the manner alleged by  
6 Arthrex. Moreover, Dr. Greenleaf's third proposed reason to combine – that  
7 the KFx patent provides a reason for combining the alleged prior art references  
8 – is a legally impermissible reason to combine prior art references. Arthrex  
9 cannot provide a reason to combine the alleged prior art references and therefore  
10 cannot meet its high burden of proving by clear and convincing evidence that  
11 the invention claimed by the KFx patents would have been obvious to a person  
12 of ordinary skill in the art at the time the invention was made.

13 Moreover, KFx will present evidence at trial regarding various secondary  
14 considerations of non-obviousness, including evidence that the inventions of the  
15 KFx patents met a long-felt but unresolved need. KFx will also present  
16 evidence that its patented methods have been commercially successful as a  
17 result of the patented features. KFx will also show that Arthrex recognized a  
18 need for KFx's invention after KFx had made its invention.

19 **3. Claims 1 and 3 of the '969 Patent Are Supported by an**  
20 **Adequate Written Description**

21 To establish invalidity for failing to comply with the written description  
22 requirement, the party challenging validity must show by clear and convincing  
23 evidence that the written description of the invention in the patent is not  
24 adequate. *See Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1354 (Fed.  
25 Cir. 2010) (*en banc*). The written description requirement is satisfied if a person  
26 of ordinary skill in the field of the invention would recognize, from reading the  
27 patent specification, that the inventor possessed the subject matter finally  
28 claimed in the patent. *See Streck, Inc. v. Research & Diagnostic Sys., Inc.*, 665

1 F.3d 1269, 1285 (Fed. Cir. 2012). It is unnecessary to spell out every detail of  
 2 the invention in the specification, however, and specific examples are not  
 3 required to comply with the written description requirement. *Id.*

4 Arthrex cannot prove by clear and convincing evidence that the written  
 5 description of the KFx patents does not adequately describe the invention  
 6 recited in claims 1 and 3 of the '969 patent. These claims require an anchor tip  
 7 comprising an aperture through which suture is threaded prior to inserting the  
 8 anchor into bone. The specification of the '969 patent demonstrates that the  
 9 inventors were in possession of a method of attaching soft tissue to bone where  
 10 at least one anchor comprises an anchor tip having an aperture through which  
 11 suture material is threaded prior to insertion of that anchor.

12 **C. KFx Is Entitled to Damages for Arthrex's Willful Infringement**

13 **1. KFx Is Entitled to a Reasonable Royalty for Arthrex's**  
 14 **Infringement of the KFx Patents**

15 Once liability for infringement has been established, a patentee is entitled  
 16 to damages adequate to compensate for the infringement, which shall be no less  
 17 than a reasonable royalty. 35 U.S.C. § 284. A reasonable royalty is determined  
 18 based upon a hypothetical negotiation between a willing licensor and a willing  
 19 licensee occurring just before infringement began. *See Uniloc USA, Inc. v.*  
 20 *Microsoft Corp.*, 632 F.3d 1292, 1312 (Fed. Cir. 2011). An established method  
 21 of evaluating the likely outcome of this hypothetical negotiation is to consider  
 22 the 15 factors set forth in *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F.  
 23 Supp. 1116, 1120 (S.D.N.Y. 1970).

24 KFx is entitled to a reasonable royalty on the revenue generated by  
 25 Arthrex's sale of the products used in the accused procedures occurring after  
 26 September 8, 2009, the issue date of the '311 patent. Based on these sales,  
 27 KFx's damages expert, Mr. George Strong, will testify that KFx is entitled to  
 28 \$61.6 million of damages for sales through June 2013. This equals 11.7% of



1 Arthrex's revenue from products used in the infringing procedures. KFx will  
2 also seek an accounting for damages due to any infringing sales from trial  
3 forward, and will seek pre-judgment and post-judgment interest on any damages  
4 award.

5 To determine the amount of damages owed to KFx, Mr. Strong first  
6 determined the number of accused procedures performed by surgeons using  
7 Arthrex's products. Although Arthrex does not formally track the number of  
8 those procedures, Arthrex has estimated the number of those procedures at  
9 various times in the normal course of its business based upon certain  
10 assumptions. Mr. Strong will testify that, using Arthrex's estimates and  
11 assumptions, as well as a regression analysis, he determined the anchor sales  
12 associated with the infringing procedures. Mr. Strong also determined the  
13 profits that Arthrex earned from selling anchors for use in those procedures.

14 Mr. Strong will also rely on Dr. Jonathan Ticker, who is an orthopedic  
15 surgeon specializing in shoulder surgery and KFx's medical expert. Dr. Ticker  
16 opined regarding the types of procedures that would have been available  
17 alternatives had the accused procedures not been available, *i.e.*, "but for" the  
18 infringement. Dr. Ticker also opined regarding the frequency with which  
19 surgeons would have been expected at the time of the hypothetical negotiation  
20 to perform the various alternative procedures, each of which used different  
21 numbers and types of anchor. Based on Dr. Ticker's determinations, Mr. Strong  
22 calculated the incremental profits that Arthrex earned from selling anchors to be  
23 used in the accused procedures instead of the alternative procedures.

24 Mr. Strong will further testify that parties to a hypothetical negotiation  
25 would have determined a reasonable royalty based on that incremental profit.  
26 Mr. Strong will testify that, after considering the *Georgia Pacific* factors, an  
27 equal division of the incremental profits is the proper measure of a reasonable  
28 royalty in this case.



1           **2. Enhancement of Damages**

2           Upon a finding of infringement and assessment of damages against the  
3           infringer, “the court may increase the damages up to three times the amount  
4           found or assessed.” 35 U.S.C. § 284. The decision to award such enhanced  
5           damages may be based on willful infringement or bad faith. *See Seagate*, 497  
6           F.3d at 1368 (citing *Beatrice Foods Co. v. New England Printing &*  
7           *Lithographing Co.*, 923 F.2d 1576, 1578 (Fed. Cir. 1991)). Based on Arthrex’s  
8           willful infringement of the KFx patents, KFx is entitled to up to three times the  
9           amount of damages awarded.

10           **3. Arthrex Should Pay KFx’s Attorneys’ Fees**

11           In exceptional cases, the court may award reasonable royalties to the  
12           prevailing party. 35 U.S.C. § 285. A defendant’s willful infringement justifies  
13           an award of reasonable attorneys’ fees. *See Whitserve, LLC v. Computer*  
14           *Packages, Inc.*, 694 F.3d 10, 37 (Fed. Cir. 2012). Based on Arthrex’s willful  
15           infringement of the KFx patents, the Court should deem this case exceptional  
16           and award KFx its attorneys’ fees.

17           **D. Arthrex Should Be Permanently Enjoined From Continuing To**  
18           **Infringe The KFx Patents**

19           After establishing infringement of a valid patent, a court may grant an  
20           injunction in accordance with the principles of equity to prevent continued  
21           infringement. 35 U.S.C. § 283. To obtain a permanent injunction, the plaintiff  
22           must demonstrate:

- 23           (1) that it has suffered an irreparable injury; (2) that remedies  
24           available at law, such as monetary damages, are inadequate to  
25           compensate for that injury; (3) that, considering the balance of  
26           hardships between the plaintiff and defendant, a remedy in equity is  
27           warranted; and (4) that the public interest would not be disserved  
                by a permanent injunction.

28           *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

KFx will demonstrate that it has suffered irreparable injury because of Arthrex's willful infringement of the KFx patents. KFx will also show that remedies at law, such as monetary damages, are inadequate to compensate KFx for the injury suffered as a result of Arthrex's willful infringement of the KFx patents. Additionally, KFx will show that, in considering the balance of hardships between KFx and Arthrex, a remedy in equity is warranted. Finally, KFx will demonstrate that the public interest would not be disserved by permanently enjoining Arthrex from infringing the KFx patents.

### **III. PROCEDURAL ISSUES**

KFx is not currently aware of any procedural issues that require resolution by the Court.

### **IV. EVIDENTIARY ISSUES**

The parties have raised a number of objections to one another's exhibits and deposition designations. However, one exhibit that Arthrex only recently added to its exhibit list, DX 5987, raises an important evidentiary issue that should be addressed prior to trial. Because Arthrex only added DX 5987 to its exhibit list on August 9, 2013, the day the Court heard argument on motions *in limine*, KFx was not aware that Arthrex intended to use the exhibit when KFx prepared its motions *in limine*. Nevertheless, DX 5987 should be excluded under Rules 402 and 403, and Arthrex should be precluded from making any reference to the exhibit at trial.<sup>2</sup>

#### **A. Background – Arthrex's Method Patent (DX 5987)**

DX 5987 is a copy of U.S. Patent No. 8,012,174, a patent that Arthrex obtained on the specific surgical procedures at issue in this case. Appendix 1 (DX 5987). The specification of the '174 patent expressly refers to and

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<sup>2</sup> DX 5987 is an Arthrex patent. Arthrex also added the patent's file history (DX 5988) and publication (DX 5993) to its exhibit list on the same day, August 9, 2013. These two exhibits should be excluded for the same reasons DX 5987 should be excluded.

describes Arthrex's PushLock and SwiveLock anchors, *id.* at col. 4, lines 8-15 and 54-59, and the claims of the '174 patent are limited to methods using anchors with certain specific features of the PushLock and SwiveLock, *id.* at cols. 6-10. For example, the claims of the '174 patent all require a "cannulated interference device." *Id.*

The provisional patent application that led to the '174 patent was filed on February 1, 2006, sixteen months after KFx filed the September 17, 2004 provisional application that led to the asserted KFx patents. *Id.* KFx's '311 patent is therefore prior art to the '174 patent and, in fact, the publication of KFx's June 1, 2005 patent application is listed among the "References Cited" on the front page of the '174 patent. *Id.*

**B. Arthrex's Method Patent Is Legally Irrelevant And Should Be Excluded Under Rule 402**

The fact that Arthrex has a patent on a specific implementation of KFx's patented surgical method – one using the specific anchors marketed by Arthrex – is *no defense* to Arthrex's infringement of the KFx patents. As the Federal Circuit explained long ago, "where [a] defendant has appropriated the material features of the patent in suit, infringement will be found even when those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for the improvement." *Atlas Powder Co. v. E. I. Du Pont De Mours & Co.*, 750 F.2d 1569, 1580 (Fed. Cir. 1984) (quotation marks omitted); *see also Bio-Technology Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1559 (Fed. Cir. 1996) ("The existence of one's own patent does not constitute a defense to infringement of someone else's patent."). This is because a patent is not a determination by the Patent Office that the patent owner has the right to practice his invention; rather, a patent only confers the right to exclude others from using the invention. *See Atlas*, 750 F.2d at 1580-81 (citing *Herman v. Youngstown Car Mfg. Co.*, 191 F. 579 (6th Cir. 1911)).

Because Arthrex's patent on the infringing surgical procedures is no defense to infringement, that patent is irrelevant to any issue in the case and should be excluded. *See Fiskars, Inc. v. Hunt Mfg. Co.*, 221 F.3d 1318, 1324 (Fed. Cir. 2000) (affirming the exclusion of the defendant's patent); *Bio-Technology*, 750 F.2d at 1559 (that the defendant had patented its specific method was "irrelevant"); *Advanced Respiratory, Inc. v. Electromed, Inc.*, 2003 WL 25674810, \*1 (D. Minn. June 27, 2003) (excluding the defendants' patent because "issuance of the '749 patent is not relevant to the infringement issue").<sup>3</sup>

**C. Arthrex Should Be Precluded Under Rule 403 From Introducing Or Referring To Its Irrelevant Method Patent**

Arthrex's method patent should also be excluded because it would cause jury confusion and unfair prejudice to KFx, and because it would waste time and distract the jury. Jurors unfamiliar with the law inevitably conclude, contrary to black-letter law, that the Patent Office would not have granted a defendant its own patent unless the defendant was entitled to practice that patent. In this case, the law is counter-intuitive. Thus, even well-instructed jurors tend to conclude that a defendant with a patent cannot infringe other patents, especially the patents considered by the Patent Office. KFx's '311 patent publication was considered by the Patent Office during the prosecution of Arthrex's application, making it highly likely that jurors would become confused and improperly rely on DX 5987 as proof of noninfringement. Such jury confusion would unfairly prejudice KFx.

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<sup>3</sup> The courts have carved out one narrow exception to the rule that a defendant's patent on the accused product or method is irrelevant. Specifically, a defendant's patent can sometimes be relevant to establishing that the differences between the accused product or method and the claimed invention are not insubstantial and therefore that the accused product or method is not equivalent to the claimed invention under the doctrine of equivalents. However, that exception is inapplicable here. KFx has dropped its claim of infringement under the doctrine of equivalents pursuant to an agreement between the parties. The jury verdict form and jury instructions filed today by KFx reflect this streamlining of the case.

1           Moreover, introducing DX 5987 would distract the jury from the real  
2 issues in the case and result in much wasted time. Before the Court set time  
3 limits of fifteen hours per side, KFx expected to address DX 5987, the issued  
4 ‘174 patent, in the course of addressing the patent application that led to the  
5 ‘174 patent. The patent *application* is relevant because, as explained in KFx’s  
6 opposition to Arthrex’s summary judgment motion, Arthrex originally tried to  
7 obtain a broad patent directed to KFx’s invention long after KFx had filed its  
8 own patent application. Arthrex’s broad patent application therefore constitutes  
9 praise for KFx’s patented invention, a “secondary consideration” which  
10 indicates that KFx’s invention is not obvious. However, because KFx’s  
11 application was filed first and was prior art to Arthrex’s application, Arthrex  
12 was required to narrow its claims to cover only an alleged improvement to the  
13 KFx procedure. The narrow patent that resulted, DX 5987, is not relevant to  
14 any issue in the case. Only if KFx relied on the Arthrex patent application could  
15 the resulting issued patent arguably be admissible for completeness.

16           After the Court set time limits for trial, KFx recognized that it would not  
17 have time to explain to the jury the relevance of Arthrex’s broad patent  
18 application *and* ensure that the jury understood that the narrower issued patent  
19 was not evidence of noninfringement. Accordingly, KFx will not introduce or  
20 refer to the patent application. The issued patent is therefore not necessary for  
21 completeness and thus has no relevance to any issue in the case. If Arthrex is  
22 permitted to introduce or discuss this irrelevant patent, however, KFx will be  
23 forced to waste valuable time explaining the patent’s file history, establishing  
24 the narrow scope of its claims, and ensuring that the jury understands that the  
25 patent is not proof of noninfringement.

26           Because of the risk of jury confusion and unfair prejudice to KFx, as well  
27 as the certainty of wasted time and distraction of the jury, the Court should  
28 preclude Arthrex from introducing or referring to DX 5987. *See Glaros v. H.H.*

1 *Robertson Co.*, 797 F.2d 1564, 1572-73 (Fed. Cir. 1986) (“Introduction of [the  
2 defendant’s patent and other evidence] would have injected frolics and detours  
3 and would have required introduction of counter-evidence, all likely to create  
4 side issues that would have unduly distracted the jury from the main issues.”);  
5 *Advanced Respiratory*, 2003 WL 25674810 at \*1 (“Aside from the great  
6 confusion that this would cause with the jury, it would also misdirect the jury’s  
7 attention from the real issue of the case.”); *Advanced Cardiovascular Sys., Inc.*  
8 *v. Medtronic, Inc.*, 2000 WL 34334583, \*6 (N.D. Cal. Mar. 31, 2000)  
9 (“presenting evidence to the jury that the [accused device] was covered by  
10 patents risked misleading the jury…”).

11 In sum, pursuant to Rules 402 and 403 of the Federal Rules Of Evidence,  
12 Arthrex should be precluded from introducing or referring to DX 5987.

13  
14 Respectfully submitted,

15  
16 KNOBBE, MARTENS, OLSON & BEAR, LLP  
17

18 Dated: August 12, 2013

By: s/ Joseph F. Jennings

19 Joseph F. Jennings  
20 Brian Horne  
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22 Sarah Lampton  
23 Marissa Calcagno

24 Attorneys for Plaintiff  
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28

**PROOF OF SERVICE**

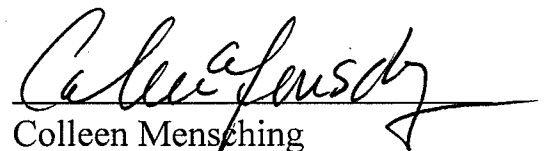
I hereby certify that on August 12, 2013, I caused **PLAINTIFF'S TRIAL BRIEF PURSUANT TO LOCAL RULE 16.1(f)(9)(a)** to be electronically filed with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to the following person(s):

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I certify and declare under penalty of perjury under the laws of the State of California that I am employed in the office of a member of the bar of this Court at whose direction the service was made, and that the forgoing is true and correct.

Executed on August 12, 2013, at San Diego, California.

  
Colleen Mensching

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